

**401 KAR 42:250. Petroleum Storage Tank Environmental Assurance Fund reimbursement procedures.**

RELATES TO: KRS 224.01-400, 224.01-405, 224.60-120, 224.60-130, 224.60-135, 224.60-140, 224.60-150

STATUTORY AUTHORITY: KRS 224.60-120(6), 224.60-130 (1)(a)-(e)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.60-130(1)(a) through (e) requires the establishment of the procedures to administer the Petroleum Storage Tank Environmental Assurance Fund (PSTEAF). This administrative regulation establishes procedures to administer the PSTEAF.

Section 1. Applicability. This administrative regulation establishes the eligibility requirements and procedures for a petroleum storage tank owner or operator to make application, become an eligible applicant, and receive reimbursement from the cabinet for the cost of corrective action due to a release from a petroleum storage tank. Federal and state-owned facilities shall not be eligible for reimbursement from the PSTEAF.

(2) Eligible reimbursement for actions directed by the Underground Storage Tank Branch prior to October 6, 2011 shall be made in accordance with 401 KAR Chapter 42 in effect prior to October 6, 2011.

Section 2. Application for Assistance. (1) A petroleum storage tank owner or operator seeking reimbursement from either the Financial Responsibility Account or the Petroleum Storage Tank Account, shall:

(a) Have a Certificate of Registration and Reimbursement Eligibility, in accordance with 401 KAR 42:020, or a Certificate of Eligibility, issued prior to September 13, 2006, which indicates that the petroleum storage tank owner or operator is eligible to participate in the Petroleum Storage Tank Environmental Assurance Fund for the associated UST Facility;

(b) Apply for assistance.

1. A petroleum storage tank owner or operator seeking reimbursement, who has not submitted an Application for Assistance, shall submit a completed Application for Assistance, DEP 6063, including all required attachments.

2. A petroleum storage tank owner or operator shall certify in the Application for Assistance that:

a.(i) A contract has been entered into and submitted in accordance with Section 3 of this administrative regulation; and

(ii) A release requiring corrective action from an eligible facility has occurred and has been reported to the cabinet; or

b. A written directive from the Underground Storage Tank Branch has been issued for the performance of a site check, in accordance with 401 KAR 42:050; and

(c) Provide a written notice, in accordance with 401 KAR 42:070, to the applicable regional office at least fourteen (14) calendar days prior to commencement of the permanent closure of the petroleum storage tank to maintain eligibility for reimbursement.

(2) If an Application for Assistance is found deficient by the Underground Storage Tank Branch, a written deficiency letter, outlining the deficiencies, shall be issued to the applicant.

(a) Failure by the applicant to provide the requested information and documentation within thirty (30) days of receipt of the request shall cause the application to be denied.

(b) If an extension beyond the thirty (30) days is necessary, the extension request shall be submitted in writing to the Underground Storage Tank Branch prior to the deadline.

(c) Denial of the Application for Assistance shall not prevent the petroleum storage tank

owner or operator from reapplying if the requested documentation becomes available.

(3) If the applicant meets the requirements of subsection (1) of this section, the Underground Storage Tank Branch shall:

(a) Determine the eligibility of the applicant to receive reimbursement from either the Financial Responsibility Account or the Petroleum Storage Tank Account according to Section 4 of this administrative regulation; and

(b) Approve the Application for Assistance.

(4) Reimbursement pursuant to an approved Application for Assistance shall be restricted to:

(a) Actions directed in writing by the Underground Storage Tank Branch; and

(b) Initial abatement actions taken at a facility in accordance with Section 2 of the Release Response and Initial Abatement Requirements Outline, incorporated by reference in 401 KAR 42:060, subject to the reimbursement provisions of Section 2.14 of the Contractor Cost Outline, prior to a written directive from the Underground Storage Tank Branch, and not declared an environmental emergency by the cabinet;

(5) If the petroleum storage tank owner or operator seeking reimbursement from the PSTEAF changes and the new petroleum storage tank owner or operator assumes responsibility for the compliance with 401 KAR Chapter 42, the new petroleum storage tank owner or operator shall:

(a) Submit an amended UST Facility Registration Form, DEP 7112, in accordance with 401 KAR 42:020, Section 4 indicating a change in petroleum storage tank owner or operator; and

(b) Submit an amended Application for Assistance, DEP6063, including all required attachments, within thirty (30) days of the transfer of the facility.

(6) To maintain eligibility for participation in and reimbursement from the PSTEAF, the petroleum storage tank owner or operator shall maintain compliance with the requirements of this administrative regulation.

Section 3. Contracts. (1) A petroleum storage tank owner or operator shall obtain a contract from the eligible company or partnership to be eligible for reimbursement from the cabinet for the performance of corrective action or site check activities for a facility.

(2) The contract shall be executed prior to commencing corrective action or site check activities.

(3) If a contract is revised, a copy of the revised contract shall be submitted to the Underground Storage Tank Branch within thirty (30) days of the revised contract execution.

(4) If a contract is terminated and a new contract is executed:

(a) A notarized Affidavit of Termination of Contract, DEP 0061 by the petroleum storage tank owner or operator approved for PSTEAF reimbursement shall be submitted to the Underground Storage Tank Branch; and

(b) A copy of the newly executed contract shall be submitted to the Underground Storage Tank Branch prior to commencing corrective action or site check activities.

Section 4. Account Placement. (1) A petroleum storage tank owner or operator shall be eligible to receive reimbursement for corrective action costs, site checks activities directed in writing by the Underground Storage Tank Branch after September 13, 2006 that do not confirm contamination above applicable screening levels, and third-party claims in accordance with 401 KAR 42:300, incurred on or after April 9, 1990, from the Financial Responsibility Account if the petroleum storage tank owner or operator has satisfied the following requirements:

(a) Registered the petroleum storage tanks with the Underground Storage Tank Branch in accordance with 401 KAR 42:020 prior to the release requiring corrective action or site check

activities;

(b) Received a Certificate of Registration and Reimbursement Eligibility for the petroleum storage tanks, pursuant to 401 KAR 42:020, or a Certificate of Eligibility issued prior to September 13, 2006 prior to the release requiring corrective action or site check activities;

(c) Maintained UST system release detection as required by 401 KAR 42:040. A petroleum storage tank permanently or temporarily closed in accordance with 401 KAR 42:070, shall have maintained compliance with UST system release detection requirements prior to the permanent or temporary closure of the system;

(d) Maintained corrosion protection in accordance with 401 KAR 42:030 and 42:070;

(e) Maintained overfill and spill prevention in accordance with 401 KAR 42:030 for those tanks in operation after December 22, 1998;

(f) Reported the release to the cabinet in accordance with KRS 224.01-400 and 401 KAR 42:050;

(g) Performed initial abatement procedures as required by the Release Response and Initial Abatement Requirements Outline, incorporated by reference in 401 KAR 42:060; and

(h) Filed a Notice of Intent to Permanently Close Underground Storage Tank System, DEP 7114, incorporated by reference in 401 KAR 42:070, if applicable, with the cabinet to permanently close the petroleum storage tank at the facility or to make a change in service in accordance with 401 KAR 42:070.

(2) A petroleum storage tank owner or operator who is not eligible for participation in the Financial Responsibility Account, shall be eligible for reimbursement from the Petroleum Storage Tank Account for corrective action costs, incurred on or after April 9, 1990, or site check activities directed in writing by the Underground Storage Tank Branch after September 13, 2006, that do not confirm contamination above applicable screening levels, if the petroleum storage tank owner or operator has satisfied the following requirements:

(a) Registered the petroleum storage tanks with the Underground Storage Tank Branch in accordance with 401 KAR 42:020;

(b) Filed a Notice of Intent to Permanently Close Underground Storage Tank System, DEP 7114, incorporated by reference in 401 KAR 42:070, with the cabinet to permanently close the petroleum storage tanks at the facility, if applicable, or to make a change in service, if applicable, in accordance with 401 KAR 42:070; and

(c) Reported a release to the cabinet in accordance with KRS 224.01-400 and 401 KAR 42:050.

(3) Facilities placed in the Petroleum Storage Tank Account shall not be eligible for third-party coverage.

Section 5. Entry Level to the Financial Responsibility Account and Petroleum Storage Tank Account. (1) For facilities with releases confirmed after September 13, 2006, a petroleum storage tank owner's or operator's entry level, as established in KRS 224.60-120(1), shall be deducted from the eligible reimbursement except as provided in subsection (3) of this section.

(2) An entry level shall be assessed upon confirmation of a release, constituting an occurrence, that requires corrective action for which the applicant is seeking reimbursement through the Financial Responsibility Account or Petroleum Storage Tank Account in accordance with subsection (1) of this section, regardless of a petroleum storage tank owner's participation in the Small Owner Tank Removal Account in accordance with 401 KAR 42:330.

(3) The entry level shall not be deducted from the eligible reimbursement if the petroleum storage tank owner or operator is directed by the Underground Storage Tank Branch to perform a site check, in accordance with 401 KAR 42:060, that does not confirm contamination requiring further action in accordance with 401 KAR Chapter 42.

(4) Upon request by the petroleum storage tank owner or operator, the Underground Storage Tank Branch shall reimburse, upon final payment, twenty-five (25) percent of the entry level if the petroleum storage tank owner or operator has:

(a) Completed corrective action at the facility within:

1. 180 days from the discovery of the release, for soil contamination only; or
2. Twenty-four (24) months from the discovery of the release, for groundwater contamination only or both soil and groundwater contamination; and

(b) Received a no further action letter without additional measures being required for an occurrence associated with the submittal of an Application for Assistance.

(5) The applicable entry level shall be determined, in accordance with KRS 224.60-120(1), based on the number of tanks owned by the petroleum storage tank owner or operator at the time of the occurrence associated with the submittal of an Application for Assistance.

Section 6. Newly Discovered Underground Storage Tank Systems. (1) A newly discovered underground storage tank system encountered at a facility during the performance of corrective action due to a release from a registered petroleum storage tank shall not affect a petroleum storage tank owner's or operator's account placement eligibility.

(2) The number of newly discovered tanks shall not increase the entry level of the petroleum storage tank owner or operator.

Section 7. Procedures for Establishing the Reimbursable Amount for a Written Directive issued by the Underground Storage Tank Branch. (1) The reimbursable amount established for the completion of a written directive issued by the Underground Storage Tank Branch shall be based on the following:

(a) The formulated task rates established in Section 2.0 of the Contractor Cost Outline;

(b) A cost estimate submitted by the owner or operator, in accordance with subsection (2) of this section, for a specific task, including applicable materials, that does not have a formulated task rate in the Contractor Cost Outline; or

(c) A combination of (a) and (b) of this subsection.

(2) If directed in writing by the Underground Storage Tank Branch, a cost estimate shall be submitted by the owner or operator, for a specific task that does not have a formulated task rate. The cost estimate shall:

(a) Include a cost itemization to complete the individual task for which a formulated task rate has not been established if the task is being completed by the eligible company or partnership or by a subcontractor which shall be calculated using those personnel and equipment rates established in Section 3 of the Contractor Cost Outline applicable to individual components of the task;

(b) Include three (3) bids from suppliers or manufactures of corrective action equipment for individual equipment purchase or rental, exceeding \$3,000, containing a description of the equipment to be purchased or rented provided by the supplier or manufacturer for new equipment purchased;

(c) Include an estimate for materials to be purchased;

(d) Be submitted on the Cost Estimate form, DEP 6090; and

(e) Include the required supporting documentation identified within the Cost Estimate form, DEP 6090.

(3) The Underground Storage Tank Branch shall, based on the applicable rates established in the Contractor Cost Outline and the completed Cost Estimate form, DEP 6090, submitted, if applicable, establish the reimbursable amount in a written directive.

(4) The cabinet shall attach to the written directive the following:

- (a) An itemization of the reimbursable amount; and
- (b) The USTB Written Directive Claim Request form, DEP 6091;
- (5) The issuance of a written directive by the Underground Storage Tank Branch shall, subject to the provisions of Section 8 of this administrative regulation, constitute an obligation and guarantee of payment of the reimbursable amount identified within a written directive, in accordance with KRS 224.60-140(5).
- (6) The reimbursable amount established by the Underground Storage Tank Branch in a written directive shall, as applicable and in accordance with the Contractor Cost Outline, be adjusted as follows upon compliance by the eligible applicant with Section 8 of this administrative regulation:
  - (a) The reimbursable amount for over-excavation identified in the written directive issued by the Underground Storage Tank Branch is an estimate of the tonnage to be removed and shall be based on the volume and density of material in the proposed excavation area. The Underground Storage Tank branch shall convert cubic yardage to tons using a density of one and one-half (1.5) tons per cubic yard. The reimbursable amount shall be adjusted based on:
    - 1.a. The tonnage verified through the submittal of weigh tickets; or
    - b. If soil is disposed of at a permitted disposal facility incapable of providing weigh tickets, a calculation of the tonnage associated with the actual area and depth of over-excavation, not to exceed the tonnage estimate identified in the written directive from the Underground Storage Tank Branch; and
  - 2. Reimbursement for the removal, transportation, and disposal of water encountered within the over-excavation shall be contingent upon analytical confirmation that contaminant levels within the water exceed the applicable groundwater screening levels, and the reimbursable amount for water removed, transported, and disposed shall be based on the quantity of water disposed, as documented by disposal manifests and limited to one (1) pit volume;
  - (b) The reimbursable amount for a Dual Phase Extraction Event identified in a written directive issued by the Underground Storage Tank Branch shall be adjusted to include the amount of water disposed as documented by disposal manifests, or the amount of water verified by the eligible company or partnership as being treated on site;
  - (c) The reimbursable amount for Operation and Maintenance of an approved remediation system shall be adjusted to include the actual cost of utilities as documented by invoices submitted;
  - (d) If the Underground Storage Tank Branch has not received and approved the Application for Assistance, DEP 6063, prior to the issuance of the written directive, the reimbursable amount identified in the written directive issued shall not include the applicable formulated task rates for mobilization, per diem and field equipment cost. The Underground Storage Tank Branch shall add the applicable formulated task rates for mobilization, per diem, and field equipment to the reimbursable amount, in accordance with the Contractor Cost Outline once an approved Application for Assistance is submitted;
  - (e) If the Underground Storage Tank Branch has not received a signed contract between the eligible applicant and the eligible company or partnership prior to the issuance of the written directive, the reimbursable amount identified in the written directive issued shall not include the applicable formulated task rates for mobilization, per diem, and field equipment cost. The Underground Storage Tank Branch shall add the applicable formulated task rates for mobilization, per diem, and field equipment to the reimbursable amount, in accordance with the Contractor Cost Outline, once the requirements of Section 3 of this administrative regulation are met;
  - (f) If a written directive issued by the Underground Storage Tank Branch cannot be complied with to the extent necessary to achieve a technically complete determination by the Under-

ground Storage Tank Branch, in accordance with the Corrective Action Outline, for reasons beyond the control of the applicant and eligible company or partnership, the previously approved reimbursement amount established in the written directive shall, unless otherwise addressed in the written directive, be adjusted by the Underground Storage Tank Branch, with reference to the Contractor Cost Outline and the cost estimate submitted on the Cost Estimate form, DEP 6090, as applicable, to deduct the cost of actions not completed;

(g) If a written directive issued by the Underground Storage Tank Branch cannot be completed, based upon omissions, misrepresentations, or otherwise inaccurate information submitted by the eligible company or partnership in a previous report, the reimbursable amount identified in the written directive shall be adjusted to deduct those actions directed based upon omissions, misrepresentations, or otherwise inaccurate information submitted; or

(h) If the Underground Storage Tank Branch rescinds a written directive issued, prior to the completion of the entire scope of work identified in the written directive, the previously approved reimbursement amount shall be adjusted to reflect the cost of actions completed, with reference to the Contractor Cost Outline and the cost estimate submitted, if applicable.

(7) Reimbursement for an individual corrective action equipment purchase or rental shall not include markup and shall be limited to:

(a) The original purchase price provided by the supplier or manufacturer, including applicable sales tax, if purchased; or

(b) Rental costs not exceeding the purchase price provided by the supplier or manufacturer, if rented.

(8) Costs incurred prior to issuance of a written directive by the Underground Storage Tank Branch in accordance with this section shall be ineligible for reimbursement.

Section 8. Reimbursement Procedures for a Written Directive issued by the Underground Storage Tank Branch. (1) Reimbursement for a written directive shall be made after the following actions are completed:

(a) The submittal and approval of an Application for Assistance, DEP 6063, in accordance with Section 2 of this administrative regulation;

(b) The USTB Written Directive Claim Request Form, DEP 6091, which was provided with the written directive has been completed, signed, and submitted to the Underground Storage Tank Branch;

(c) The Payment Verification Affidavit Form, DEP 6075, as required by KRS 224.60-140(18);

(d) The Payment Waiver form, DEP 6077, executed by each affected vendor or subcontractor, as applicable, in accordance with KRS 224.60-140(18);

(e) The submittal of weigh tickets and invoices documenting the actual cost of utilities or other required backup documentation as indicated in the written directive;

(f) The technical report submitted in response to the written directive is determined by the Underground Storage Tank Branch to be technically complete in relation to the written directive and 401 KAR Chapter 42; and

(g) Payment has been received for all applicable annual registration fees in accordance with KRS 224.60-150 and 401 KAR 42:200.

(2) Reimbursement shall be contingent upon the contracted eligible company or partnership meeting and maintaining the requirements established in accordance with 401 KAR 42:316.

(3) Reimbursement shall be contingent upon a certified laboratory performing the required analysis in accordance with 401 KAR 42:340.

(4) If the contract with the eligible company or partnership designated on a written directive is terminated prior to the commencement of reimbursable activities in response to the written directive, the obligation and guarantee of payment of the reimbursable amount, made in ac-

cordance with KRS 224.60-140(5), shall be void.

(5) The information completed by the Underground Storage Tank Branch on the USTB Written Directive Claim Request form, DEP 6091, attached to the written directive, shall not be modified by the applicant or the eligible company or partnership designated on the written directive.

(6) The Underground Storage Tank Branch shall issue a determination pursuant to KRS 224.60-140(7) as to whether the costs submitted in the claim are eligible for reimbursement.

(7) All claims shall be submitted within two (2) years after issuance of a no further action letter by the Underground Storage Tank Branch.

(8) If a request to re-evaluate the reimbursable amount, established in accordance with Section 7 of this administrative regulation, is submitted in accordance with Section 14, and a not-to-exceed amount is warranted, final reimbursement shall be made on a time and material basis, which shall require the following supporting documentation:

(a) An itemization of the eligible company or partnership invoice with supporting documentation;

(b) Itemized subcontractor and vendor invoices with supporting documentation; and

(c) Time sheets to support all personnel time billed for the completion of the scope of work identified in the written directive.

Section 9. Reimbursement Procedures for Reimbursable Actions that are not Directed in Writing by the Underground Storage Tank Branch.(1) Reimbursement shall be made for the following actions, which shall not require written directives from the Underground Storage Tank Branch or cost estimates from the applicant and eligible company or partnership, in accordance with the applicable formulated task rates established in the Contractor Cost Outline;

(a) Optional Soil Removal Outside the Excavation Zone at permanent closure, in accordance with Section 6 of the Closure Outline incorporated by reference in 401 KAR 42:070;

(b) Transportation and disposal, treatment, or recycling of contaminated material or water at a permitted facility, from within the excavation zone, contaminated above applicable screening levels, at permanent closure, in accordance with the Closure Outline incorporated by reference in 401 KAR 42:070;

(c) Initial response actions, identified in Section 2.14 of the Contractor Cost Outline, taken at a facility, in accordance with Section 2 of the Release Response and Initial Abatement Requirements Outline, incorporated by reference in 401 KAR 42:060, prior to a written directive from the Underground Storage Tank Branch or prior to the date of a declared environmental emergency by the cabinet;

(d) Transportation and disposal of drums containing purged water or soil cuttings associated with actions directed in accordance with 401 KAR 42:060;

(e) Encroachment permit renewals necessary to complete directed actions; and

(f) Unscheduled maintenance of a remediation system installed in accordance with an approved Corrective Action Plan, in accordance with Section 2.13 of the Contractor Cost Outline, and invoices supporting the cost of necessary materials or equipment not exceeding a total cost of \$3,000, but shall not include unscheduled maintenance equipment costs covered by equipment warranty. Material or equipment costs associated with unscheduled maintenance of a remediation system exceeding \$3,000 shall require pre-approval before work is performed.

(2) Reimbursement shall be made after the following actions are completed:

(a) The submittal and approval of an Application for Assistance, DEP 6063, in accordance with Section 2 of this administrative regulation;

(b) The Claim Request Form For Actions Not Directed By The USTB, DEP 6064, has been completed, signed, and submitted to the Underground Storage Tank Branch;

- (c) The Payment Verification Affidavit form, DEP 6075, as required by KRS 224.60-140(18);
  - (d) The Payment Waiver form, DEP 6077, executed by each affected vendor or subcontractor, as applicable, in accordance with KRS 224.60-140(18);
  - (e) The submittal of required backup documentation as identified on the instruction sheet associated with each worksheet;
  - (f) Payment has been received for all applicable annual registration fees in accordance with KRS 224.60-10 and 401 KAR 42:200;
  - (g) The Optional Soil Removal Outside the Excavation Zone Reimbursement Worksheet, DEP 6094, has been completed and submitted to the Underground Storage Tank Branch for optional soil removal outside of the excavation zone at permanent closure in accordance with 401 KAR 42:070 for actions listed in subsection (1)(a) of this section, if performed;
  - (h) The Miscellaneous Tasks Worksheet, DEP 6093, has been completed and submitted to the Underground Storage Tank branch for actions listed in subsection (1)(b), (c), (d), (e) or (f) of this section, if performed; and
  - (i) The technical report submitted for subsection (1)(a), (b), or (c) of this section is technically complete, if applicable, in accordance with 401 KAR Chapter 42.
- (3) Reimbursement shall be contingent upon the contracted eligible company or partnership meeting and maintaining the requirements established in accordance with 401 KAR 42:316.
- (4) Reimbursement shall be contingent upon a certified laboratory performing the required analysis in accordance with 401 KAR 42:340.
- (5) The Underground Storage Tank Branch may require additional information and documentation to determine that an eligible request for reimbursement is necessary and reasonable.
- (6) If the applicant fails to correct a claim-related deficiency or to supply additional claim information within thirty (30) days of written notice from the Underground Storage Tank Branch, that portion of the claim shall be denied.
- (7) The Underground Storage Tank Branch shall issue a determination pursuant to KRS 224.60-140(7) as to if the costs submitted in the claim shall be eligible for reimbursement.
- (8) All claims shall be submitted within two (2) years after issuance of a no further action letter by the Underground Storage Tank Branch.

Section 10. Reimbursement Procedures for Facility Restoration. (1) An itemized cost estimate shall be submitted to the Underground Storage Tank Branch on the Facility Restoration Worksheet, DEP 6095, for the completion of facility restoration actions.

(2) Written approval, by the Underground Storage Tank Branch, of the cost estimate shall constitute, subject to adjustment in accordance with subsection (4) of this section, an obligation and guarantee of payment, in accordance with KRS 224.60-140(5), for the cost of actions that are completed in full.

(3) Costs incurred prior to the written approval of the cost estimate by the Underground Storage Tank Branch shall be ineligible for reimbursement.

(4) Upon the completion of site restoration actions, final reimbursement shall be based on the costs identified through the submittal of the Facility Restoration Worksheet, DEP 6095, that identified the actual work completed.

(5) Reimbursement for facility restoration actions involving the replacement of surface material shall be limited to costs necessary for the replacement of surface material removed during corrective action activities.

(6) Reimbursement for site restoration activities shall be made after the following actions are completed:

- (a) The submittal and approval of an Application for Assistance, DEP 6063, in accordance



with Section 2 of this administrative regulation;

(b) The Claim Request Form For Actions Not Directed by the USTB, DEP 6064, has been completed, signed, and submitted to the Underground Storage Tank Branch;

(c) The Payment Verification Affidavit form, DEP 6075, as required by KRS 224.60-140(18);

(d) The Payment Waiver form, DEP 6077, executed by each affected vendor or subcontractor, as applicable, in accordance with KRS 224.60-140(18);

(e) The Facility Restoration Worksheet, DEP 6095, has been completed and submitted, with the required documentation, to the Underground Storage Tank Branch; and

(f) Payment has been received for all applicable annual registration fees in accordance with KRS 224.60-150 and 401 KAR 42:200.

(7) Reimbursement shall be contingent upon the contracted eligible company or partnership meeting and maintaining the requirements of 401 KAR 42:316.

(8) The Underground Storage Tank Branch may require additional information and documentation to determine that an eligible request for reimbursement is necessary and reasonable.

(9) If the applicant fails to correct a claim-related deficiency or to supply additional claim information within thirty (30) days of written notice from the Underground Storage Tank Branch, that portion of the claim shall be denied.

(10) The Underground Storage Tank Branch shall issue a determination pursuant to KRS 224.60-140(7) as to if the costs submitted in the claim are eligible for reimbursement.

(11) All claims shall be submitted within two (2) years after issuance of a no further action letter by the Underground Storage Tank Branch.

Section 11. Reimbursement for Actions Directed and Documented by the Environmental Response Branch during a Declared Environmental Emergency. Reimbursement for actions directed and documented by the Environmental Response Branch during a declared environmental emergency shall not be governed by this administrative regulation and shall be made in accordance with procedures established by the cabinet.

Section 12. Eligible and Ineligible Costs. (1) Eligible costs for regulated petroleum storage tanks containing motor fuel shall include:

(a) Tank and Line Tightness Testing as requested in writing by the Underground Storage Tank Branch in conjunction with Site Check, Site Investigation, or Corrective Action activities for a facility;

(b) Site checks at a facility, upon a written directive after September 13, 2006, by the Underground Storage Tank Branch;

(c) Performance of corrective action as defined in KRS 224.60-115(4), due to a release of motor fuel from a regulated petroleum storage tank system, upon written direction by the Underground Storage Tank Branch;

(d) Transportation, disposal, or treatment at a permitted facility, and replacement of backfill material, excluding the tank volume, contaminated above applicable screening levels within the excavation zone;

(e) Transportation and disposal, treatment, or recycling, at a permitted facility, of free product or water contaminated above screening levels encountered within the excavation zone, during permanent closure activities in accordance with 401 KAR 42:070, or as directed in writing by the Underground Storage Tank Branch for those facilities currently performing corrective action activities in accordance with 401 KAR 42:060;

(f) The cost of surface material replacement for excavated areas directly associated with corrective action activities;

(g) Initial response actions taken outside of the excavation zone, in accordance with Section 2 of the Release Response and Initial Abatement Requirements Outline, incorporated by reference in 401 KAR 42:060, prior to a written directive from the Underground Storage Tank Branch or prior to the date of a declared emergency by the cabinet; and

(h) Other costs, associated with corrective action activities, as identified in a written directive issued by the Underground Storage Tank branch for the facility.

(2) Ineligible costs for regulated petroleum storage tanks containing motor fuel shall include:

(a) Replacement, repair, maintenance, or retrofitting of tanks or piping;

(b) Out-of-state travel expense, including air fare;

(c) Loss of business, income or profits;

(d) An attorney fee related to:

1. Judicial or administrative litigation;

2. Consultation on administrative regulations;

3. Preparation or submittal of documentation related to reimbursement process; or

4. Other legal services determined by the Underground Storage Tank Branch not to be integral to the performance of corrective action.

(e) Decreased property values for the facility;

(f) Facility improvements, including costs to upgrade the facility;

(g) An aesthetic improvement to the facility;

(h) The cost of surface material replacement for areas not removed as part of corrective action;

(i) Payment of the owner or operator's personnel for overtime or for staff time in planning or implementing corrective action as defined in KRS 224.60-115(4);

(j) Interest on an overdue account or loan;

(k) A cost covered by insurance payable to the owner or operator;

(l) A contractor surcharge implemented because the owner or operator failed to act in a timely fashion;

(m) Work performed that is not in compliance with safety codes;

(n) A cost associated with a release from a storage tank exempt from KRS 224.60;

(o) Contractor markup expense for a normally expected overhead item or in-stock material;

(p) Contractor markup expense for personnel cost;

(q) A laboratory "rush" fee, unless directed by the Underground Storage Tank Branch;

(r) A cost or cost recovery for governmental emergency services;

(s) Corrective action activities subsequent to the issuance of a no further action letter, unless otherwise directed in writing by the Underground Storage Tank Branch;

(t) Reimbursement for work or a portion of work performed at a facility if the results of laboratory analysis do not confirm the need for corrective action or for actions to achieve more stringent allowable levels than those prescribed by the cabinet, except for investigatory or corrective actions otherwise directed from the Underground Storage Tank Branch in writing;

(u) A cost of a party employed to act as a surrogate or stand-in for the owner or operator of the facility;

(v) Preparation of documentation, cost estimates, written agreements, contracts or client invoices that will be submitted to the Underground Storage Tank Branch for reimbursement purposes;

(w) Except as provided in 401 KAR 42:330, cost related to the removal, or actions incidental to the removal of a tank system;

(x) Cost of resampling and laboratory tests performed as a result of an operational or methodology mistake by the analytical laboratory, or cost for an analytical laboratory to become certified or accredited under the requirements of KRS 224.60-130(1)(a) and 401 KAR 42:340;

- (y) Costs relating to compliance with a local program having corrective action standards more stringent than those required by the cabinet;
- (z) Costs to achieve corrective action standards more stringent than those required by the applicable administrative regulation;
- (aa) Actions resulting from contractor error or negligence;
- (bb) Costs covered by the contractor's liability insurance;
- (cc) Other services or costs determined by the Underground Storage Tank Branch to be an unreasonable or unnecessary cost of corrective action;
- (dd) Overtime for individual personnel exceeding forty (40) hours during a standard work-week;
- (ee) Free product recovery from monitoring wells or borings during corrective action activities, unless directed in writing by the Underground Storage Tank Branch;
- (ff) Costs incurred for additional assessment or Corrective Action Plan modification necessary as a result of delayed implementation of the Corrective Action Plan, beyond the deadline established in writing by the Underground Storage Tank Branch;
- (gg) Costs incurred for the purpose of compliance with permit conditions for permitted soil treatment facilities;
- (hh) The portion of the lease or rental cost for capital equipment that exceed the purchase price of the equipment;
- (ii) Costs incurred for the removal, transportation and disposal, recycling, or treatment of free product from within the excavation zone of a UST system, that is not permanently closed, for which contamination above applicable screening levels outside the excavation zone has not been confirmed;
- (jj) Costs incurred for the purpose of meeting the requirements of 401 KAR 42:020, 42:030, and 42:040;
- (kk) Equipment replacements costs covered by equipment warranty;
- (ll) Costs incurred to replace a monitoring well destroyed, damaged or that cannot be accessed or located due to actions within the control of the applicant; and
- (mm) An eligible company or partnership that employs a subcontractor, a subsidiary company, or other vendor, that is affiliated with the eligible company or partnership or a principle of the eligible company or partnerships shall not receive the fifteen (15) percent mark up for the cost of corrective action.

Section 13. Reimbursement Rates. (1) Established rates for eligible reimbursement shall be identified in the Contractor Cost Outline.

(2) Costs not included in the Contractor Cost Outline shall be reasonable and necessary to the performance of corrective action in order to be eligible for reimbursement.

(3) Pass-through costs for utilities and employee expense accounts shall not receive a markup on the actual cost.

(4) A fifteen (15) percent total markup above the estimated cost of materials purchased associated with a task for which there is not a formulated unit rate shall be allowed.

Section 14. Request for Re-Evaluation of the Reimbursable Amount Identified in a Written Directive. (1) If the applicant determines that the scope of work identified in a written directive cannot be completed without exceeding the total reimbursable amount set forth in the written directive, a request for re-evaluation of the reimbursable amount may be submitted to the Underground Storage Tank Branch on the Reimbursable Amount Re-Evaluation Form, DEP 0062, and shall include:

- (a) The submittal of three (3) current written estimates, for services or materials not provided

by the contracting company or partnership, from subcontractors in the area in which the facility is located, if applicable;

(b) The submittal of an itemized cost breakdown of the contracting company or partnership's time and materials in completing the written directive; and

(c) The costs shall be calculated using the personnel and equipment rates established in Section 3 of the Contractor Cost Outline.

(2) The Underground Storage Tank Branch shall review the itemized cost breakdown and based upon a determination of reasonable and necessary costs, the Underground Storage Tank Branch shall either:

(a) Determine that the itemized cost breakdown exceeds the reimbursable amount, rescind the written directive, and issue a new written directive establishing a not-to-exceed amount; or

(b) Determine that the reasonable and necessary costs itemized are at or below the initial reimbursement amount, and deny the request for re-evaluation, leaving the reimbursable amount identified in the original directive letter in effect.

(3) If the establishment of a not-to-exceed amount is warranted in accordance with subsection (2)(a) of this section, final reimbursement shall be determined on an actual time and materials basis, and the appropriate supporting documentation shall be submitted to the Underground Storage Tank Branch, in accordance with Section 8(8) of this administrative regulation, as an attachment to the claim.

Section 15. Signatures. (1) Forms required by this administrative regulation for which a signature is required shall be signed by an eligible petroleum storage tank owner or operator as follows:

(a) For a corporation, by:

1. A president or secretary;

2. The duly authorized representative or agent of the president or secretary if the representative or agent is responsible for overall operation of the facility; or

3. A person designated by the board of directors by means of a corporate resolution;

(b) For a partnership, sole proprietorship or individual, by a general partner, the proprietor or individual respectively;

(c) For a municipality, by:

1. A principal;

2. Executive officer; or

3. Ranking elected official; or

(d) A person designated by a court to act on behalf of the eligible petroleum storage tank owner or operator.

(2) A claim form or Application for Assistance shall also be signed by:

(a) The professional engineer or professional geologist responsible for overseeing corrective action; and

(b) An authorized representative of the eligible company or partnership, unless corrective action commenced prior to July 1, 1999.

(3) The owner or operator shall submit documentary evidence to substantiate the legality of an authorized representative's power of agency or power of attorney.

Section 16. Loss of Future Reimbursement Eligibility. (1) A petroleum storage tank owner or operator shall be ineligible to receive future reimbursement from the Financial Responsibility Account or Petroleum Storage Tank Account if the petroleum storage tank owner or operator has:

(a) Knowingly or intentionally submitted false or inaccurate information to the cabinet; or

(b) Knowingly made a false statement, representation, or certification in an application, reimbursement request, or other document submitted to the cabinet.

(2) A cost incurred by, or paid from, the cabinet based on false or inaccurate information, or a false statement, representation, or certification shall be recovered by the cabinet from the person who asserted the false or inaccurate information, or false statement, representation, or certification.

(3) The cabinet shall have the right to recover the money paid to a petroleum storage tank owner or operator, or a contractor if:

(a) The amount was paid due to an error of the cabinet in processing a claim for reimbursement;

(b) The amount was paid due to a mistake, error, or inaccurate information in the claim submitted by the petroleum storage tank owner or operator or in an invoice submitted by a contractor; or

(c) A person has obtained reimbursement from the cabinet by fraud or intentional misrepresentation.

Section 17. Subrogation. Prior to making reimbursement of a claim, the cabinet shall require, by subrogation, the rights of the person seeking reimbursement or recover the amounts paid by the cabinet for the performance of corrective action from the person responsible or liable for the release.

Section 18. Facility Inspections. The cabinet shall conduct inspections in accordance with KRS 224.60-130(1)(l) to determine the reasonableness and necessity of the costs of corrective action.

(1) The cabinet shall be authorized to enter and inspect a facility seeking reimbursement for the costs of corrective action.

(2) Refusal to allow a cabinet employee entry and inspection of a facility shall make the owner or operator ineligible for reimbursement. Money previously paid to the petroleum storage tank owner or operator of the facility shall be repaid to, or recovered by, the cabinet.

(3)(a) The cabinet shall be present at the facility during all petroleum storage tank permanent closure activities, except as provided in paragraphs (d) and (e) of this subsection;

(b) A petroleum storage tank owner or operator shall contact the appropriate Field Operations Branch regional office, by certified mail, to schedule a date to have an inspector present at the facility during petroleum storage tank permanent closure activities. The certified mail notice shall be received a minimum of fourteen (14) calendar days prior to commencement of the permanent closure.

(c) If the inspector cannot be present at the facility on the day scheduled by the notice sent as required in paragraph (b) of this subsection, the inspector shall, by written notice, require the petroleum storage tank owner or operator to reschedule the permanent closure to a proposed date. This notice shall be mailed by the cabinet no later than ten (10) days prior to the date scheduled by the petroleum storage tank owner or operator.

(d) If the inspector fails to issue notice to reschedule the permanent closure, or is not present on the day set by the notice, the permanent closure may proceed without penalty.

(e) This subsection shall not apply to an emergency removal ordered by the cabinet.

(4)(a) A petroleum storage tank owner or operator shall:

1. Provide an inspector full access to an area or well for the collection of samples;

2. Split samples obtained at the facility with the cabinet, if required by the inspector;

3. Resample an area or well for which the result of analytical testing obtained by the cabinet differs significantly from the result obtained by the petroleum storage tank owner or operator;

and

4. Have the burden of proving the validity of analytical results, if a discrepancy remains after resampling.

(b) The cabinet shall not reimburse the costs of resampling if proper sampling, sample handling, or analytical protocols were not adhered to by the contractor or certified laboratory.

(c) Failure to allow sample collection, or to split samples with the cabinet, shall render the owner or operator ineligible for reimbursement.

Section 19. Account Balance. (1) The unobligated balance of the Financial Responsibility Account shall not be less than \$1,000,000, so as to ensure a reserve balance adequate to meet federal financial responsibility requirements for participants in the account.

(2)(a) If the unobligated balance of the Financial Responsibility Account is \$1,000,000 or less, or the reimbursement of additional claims would cause the unobligated balance of the fund to be less than \$1,000,000, the cabinet shall immediately suspend claim reimbursements and the approval of applications until the unobligated balance is greater than \$1,000,000.

(b) If the suspension is lifted, the priority of reimbursement for claims submitted related to an approved application for assistance shall be determined by the date of the claim submittal.

Section 20. Incorporation by Reference. (1) The following material is incorporated by reference:

- (a) "Application for Assistance", DEP 6063, November 2016;
- (b) "Affidavit of Termination of Contract", DEP 0061, November 2016;
- (c) "Reimbursable Amount Re-Evaluation", DEP 0062, November 2016;
- (d) "Claim Request for Actions Not Directed by the USTB", DEP 6064, November 2016;
- (e) "Miscellaneous Task Reimbursement Worksheet", DEP 6093, November 2016;
- (f) "Facility Restoration Reimbursement Worksheet", DEP 6095, November 2016;
- (g) "Optional Soil Removal Outside the Excavation Zone Reimbursement Worksheet", DEP 6094, November 2016;
- (h) "Payment Verification Affidavit", DEP 6075, November 2016;
- (i) "Payment Waiver", DEP 6077, November 2016;
- (j) "Cost Estimate", DEP 6090, November 2016;
- (k) "Underground Storage Tank Branch Written Directive Claim Request", DEP 6091, November 2016; and
- (l) "Contractor Cost Outline", November 2016.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Division of Waste Management, 300 Sower Boulevard, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. This material may also be obtained at the Division of Waste Management's Web site at <http://waste.ky.gov/ust>. (32 Ky.R. 2207; 33 Ky.R. 471; 745; eff. 9-13-2006; 37 Ky.R. 2715; 38 Ky.R. 275; 530; eff. 10-6-11; TAm eff. 7-8-2016; TAm eff. 12-21-2016; Crt eff. 10-9-2018.)